



No. 1000

In the Supreme Court of the United States

OCTOBER TERM, 1943

CENTRAL STATES ELECTRIC COMPANY, PETITIONER

v.

CITY OF MUSCATINE, IOWA

and

ELMER E. JOHNSON, FOR HIMSELF AND THE USERS
OF NATURAL GAS IN THE CITY OF GREENFIELD,
IOWA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION
IN OPPOSITION



INDEX

	Page.
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Argument	8
Conclusion	13
Appendix	14

CITATIONS

Cases:

<i>Burford v. Sun Oil Co.</i> , 319 U. S. 315.....	11
<i>Chicago v. Fieldcrest Dairies, Inc.</i> , 316 U. S. 168.....	11, 12
<i>Galveston Electric Co. v. Galveston</i> , 258 U. S. 388.....	12
<i>Federal Power Commission v. Hope Natural Gas Company</i> , 320 U. S. 591.....	9
<i>Federal Power Commission v. Natural Gas Pipeline Co.</i> , 315 U. S. 575.....	2, 4
<i>Knoxville v. Knoxville Water Co.</i> , 212 U. S. 1.....	12
<i>Mississippi River Fuel Corporation v. Federal Power Com- mission</i> , 121 F. (2d) 159.....	8
<i>Pennsylvania v. Williams</i> , 294 U. S. 176.....	11
<i>Railroad Commission v. Pullman Co.</i> , 312 U. S. 496.....	11
<i>United States v. Morgan</i> , 307 U. S. 183.....	10

Statute:

Natural Gas Act, 52 Stat. 821, 15 U. S. C. §717 et seq.:	
Section 1 (b)	14
Section 4	14
Section 5	15
Section 19	10, 16

(I)



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 1000

CENTRAL STATES ELECTRIC COMPANY, PETITIONER

v. ,

CITY OF MUSCATINE, IOWA

and .

ELMER E. JOHNSON, FOR HIMSELF AND THE USERS
OF NATURAL GAS IN THE CITY OF GREENFIELD,
IOWA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT*

**BRIEF FOR THE FEDERAL POWER COMMISSION
IN OPPOSITION**

OPINIONS BELOW

The four opinions of the circuit court of appeals are reported as follows: opinion of May 22, 1942 (R. 36-46), 128 F. (2d) 481; opinion of June 26, 1942 (R. 55-56), 129 F. (2d) 515; opinion of June 30, 1942 (R. 60-63), 134 F. (2d) 263; opinion of September 3, 1942 (R. 67-80), 131 F. (2d) 137.

JURISDICTION

The orders of the circuit court of appeals of which review is sought were entered on February 14, 1944 (R. 129-131). The petition for a writ of certiorari was filed on May 13, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pending the review by the court below and by this Court of an order of the Federal Power Commission under the Natural Gas Act, reducing the interstate wholesale rates charged by Natural Gas Pipeline Company and its affiliate, there accumulated in the court below a fund of \$6,377,913, representing the difference between the rates prescribed by the Commission and the therefore existing rates which the Pipeline Company had been permitted to charge under the court's stay of the Commission's order. Following the decision of this Court in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, sustaining the Commission's order, the court below, upon petition of the Pipeline Company, assumed equitable jurisdiction to distribute that fund. The court below, with the concurrence of the distributing companies which had purchased the gas at wholesale from the Pipeline Company, entered orders distributing 99½% of the impounded fund to the ultimate consumers. The re-

maining $\frac{1}{2}$ of 1% of the fund (\$25,708), arising from sales by the Pipeline Company to petitioner, a distributing company in Iowa, was claimed by petitioner as against its ultimate consumers. The court below refused to determine finally the merits of petitioner's claim and directed that the disputed amount be paid to city treasurers, as representatives of the ultimate consumers, without prejudice to the assertion of petitioner's claim in a court or other body "having jurisdiction thereof."

The question presented is whether the court erred in so disposing of the balance of the fund.

STATUTE INVOLVED

The relevant sections of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 14-18.

STATEMENT

On July 23, 1940, the Federal Power Commission issued an order under the Natural Gas Act, directing the Natural Gas Pipeline Company of America and its affiliate, Texoma Natural Gas Company, to reduce their interstate wholesale rates charged for natural gas so as to reflect a reduction of \$3,750,000 per annum in their operating revenues (R. 1-6). Upon petition of the Pipeline Company, the court below on August 30, 1940, issued a temporary stay of the Commission's rate order (R. 32-34), and the Pipeline Company filed a \$1,000,000 bond to pay its "purchasers at wholesale of natural gas" the "amounts repre-

senting the reduction in the gross revenues of Natural Gas Pipeline Company of America which shall have accrued pending judicial review" of the Commission's order (R. 31-32). After the Pipeline Company filed a petition with the court below to review the Commission's order (R. 7-18), the court dissolved the temporary stay on November 1, 1940, and entered a new stay "until the further order of [the circuit] Court" (R. 28-29, 35). On December 3, 1940, the Pipeline Company filed and the court below approved a bond "in all respects the same as * * * the former bond" (R. 29-31), as required by the terms of the stay order.

Upon review, the court below vacated the Commission's rate order, and on March 16, 1942, this Court in turn reversed that judgment and sustained the Commission's order. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575.¹ This Court remanded the cause for further proceedings in the court below, and in the remanded proceedings the Pipeline Company petitioned the court below to take jurisdiction over, and to distribute, a fund later found to total \$6,377,913.52, representing the difference between the rates prescribed by the Commission and the

¹ At that time, this Court ruled that the question of the disposition of the excess charges collected by the Pipeline Company during the stay of the Commission's order was not for the Court's "determination on the present record." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 598.

rates which the Company had been permitted to charge under the stay order pending review.² The court held that it possessed equitable jurisdiction over the impounded fund, ancillary to its original jurisdiction to issue a stay pending review of the Commission's order under Section 19 (c) of the Natural Gas Act (R. 36-46); and that "as a court of equity" it was obliged "to determine to whom and in what amounts the distribution shall be made" (R. 45). By order of June 24, 1942, the court accordingly took "sole and exclusive jurisdiction over the disposition of the funds" payable by the Pipeline Company under the stay order and restrained all claimants from proceeding in any other court (R. 51, 52). Of this fund less than $\frac{1}{2}$ of 1% (\$25,708.54) related to natural gas purchased from the Pipeline Company by petitioner, Central States Electric Company, a natural gas distributing company in Iowa. With respect to the remaining 99 $\frac{1}{2}$ % of the fund, the distributing companies, with one exception, filed statements with the court disclaiming any interest in the refunds and agreeing that they should rightfully be distributed to the ultimate consumers (R. 47-50, 53, 65, 66).³

² The accumulation of this fund began on September 1, 1940, the date of the Commission's rate reduction order, and ceased on March 31, 1942, when the company put into effect the reduced rates prescribed by the Commission (R. 51).

³ A utility serving Nebraska City claimed that the refund of \$23,991.23 derived from its purchases of gas should be paid to it and not to its consumers. This claim was subsequently settled by stipulation, whereunder almost 70% thereof was paid to the consumers (R. 102-104).

Petitioner filed no such disclaimer, but on June 29, 1942, filed a statement with the court below claiming that the portion of the fund relating to its purchases should be paid to it and not to its ultimate consumers (R. 56-59). Petitioner alleged that a refund to individual consumers "would be a retroactive determination" that petitioner and Iowa Electric Company, the ultimate distributor of more than 80% of petitioner's purchases from the Pipeline Company, "have been earning an adequate return" (R. 59). In a memorandum opinion of June 30, 1942 (R. 60-63), the court stated that all refunds belong to the ultimate consumers, for whose benefit the rate proceedings were instituted, the distributing utilities being "merely conduits, by which natural gas transported by [the Pipeline Company] was delivered to customers by utilities" (R. 62).

The Pipeline Company thereupon deposited \$6,377,913.52 in court (R. 64); and on September 3, 1942, after earmarking the \$25,708.54 relating to petitioner's purchases (R. 68, 71), the court below ordered the distribution of the remaining 99½% of the fund among the ultimate consumers (R. 67-80, 82, 100). The \$25,708.54 to which petitioner laid claim was separated on the ground that a "distinct issue" had arisen concerning its distribution (R. 81-82).

On September 1, 1943, pursuant to leave of court (R. 115), petitioner intervened for the pur-

pose of obtaining the \$25,708.54 (R. 105-114), and the Iowa Electric Company at the same time disclaimed any interest therein (R. 111-112). After notification of petitioner's claim was given to its customers in accordance with court order (R. 115-116), the City of Muscatine, Iowa, and Elmer E. Johnson, Mayor of the City of Greenfield, Iowa, filed claims to the disputed fund as representatives of the ultimate consumers in their respective communities (R. 116-121, 122-123, 126-128).

On February 14, 1944, the court entered the two orders of which petitioner now seeks review. The first order referred to the court's prior ruling that refunds "belonged to the consumers of gas supplied by customers" of the Pipeline Company, and recited that petitioner's claim to the \$25,708.54 was based upon the alleged inadequacy of its rates, "a matter beyond the jurisdiction" of that court. That order denied Central's petition "without prejudice to its making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella, all of the State of Iowa, or with the consumers of gas furnished by it in said cities" (R. 129). The second order recited that the court was "desirous of paying [the fund], at the earliest possible date, to such parties as are entitled to the same, and to permit of a determination of said rights by a Court or body having jurisdiction thereof," and directed that the \$25,-

708.54 be paid in specified amounts to the city treasurers of each of the four Iowa cities (R. 130-131).⁴ A supplemental petition in the nature of a petition for rehearing (R. 133-139) was denied (R. 146).

ARGUMENT

The petition for certiorari seeks to have this Court review and determine the respective rights of petitioner and of the ultimate consumers of natural gas in Iowa to the \$25,708.54 fund which accumulated during the operation of the stay order. But that question was not finally determined by the orders of February 14, 1944 (R. 129-131), of which review is now sought (see Pet. 12), and is not properly before this Court. While these orders referred to the court's prior ruling that the refund belongs "to the consumers of gas" (R. 129, 130), they were made expressly without prejudice to assertion of petitioner's alleged rights to the fund in an appropriate forum.⁵ To

⁴ The order also provided that the fund should be suspended in the hands of the clerk of the court below if an appeal should be taken (R. 131, 152).

⁵ If the question were deemed to be presented in this case, the Commission would take the position that as between a distributing utility and the ultimate consumers, the fund representing charges in excess of those prescribed by the Commission, accumulating during a stay of the order, should be distributed to the consumers. The "manifest purpose" of the Natural Gas Act is the "protection of the ultimate consumer and not the intermediate utility" *Mississippi River*

this end the orders in effect placed the fund in the hands of stakeholders—responsible city officials—thereby releasing it from the jurisdiction of the court below and from the operation of the restraint against proceedings in other forums and preserving to petitioner an opportunity to test out its claimed rights to the money.⁶ This clearly appears from the orders which deny petitioner's claim to the fund "without prejudice" to its claiming "said moneys in the hands of the City Treasurers of the said cities" (R. 129-130), which suspend payment to the city treasurers pending an appeal to this Court, and which recite the court's desire to have the fund paid "at the earliest possible date, to such parties as are entitled to the same;" and to permit "a determination of said rights by a Court or body having jurisdiction thereof" (R. 130-131). The court's refusal to make a final disposition of pe-

Fuel Corporation v. Federal Power Commission, 121 F. (2d) 159, 164 (C. C. A. 8). See also *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 612.

⁶ The court below, during the course of its disposition and distribution of the \$6,377,913.52 fund, stated on several occasions that "all refunds * * * belong to the consumers, for whose benefit [the rate reduction] proceedings were instituted" (R. 62; see also R. 38, 56). However, virtually all the distributing utilities had agreed that the fund belonged to and should rightfully be distributed to the ultimate consumers (R. 47-50, 53, 65, 66, 102-104). Of the two dissenting utilities, the one in Nebraska City subsequently settled its claim (R. 102-104), and petitioner has been given an opportunity to test its claim in another forum.

petitioner's claim was accompanied by the observation that "the reasonableness of petitioner's rates" was the basis of such claim (see R. 56-59, 106-111) and that such question was beyond its jurisdiction (R. 129). However, it is not necessary to inquire into the court's power in this regard, since its action in declining to adjudicate finally petitioner's rights to the fund and in turning over the refunds to municipal treasurers, in whose hands they would be subject to appropriate local proceedings, was in any event a reasonable exercise of the court's equitable discretion.

1. Petitioner does not question the jurisdiction of the court below to distribute the fund of \$6,377,913.52 created by reason of its stay of the Commission's order (R. 36-46), nor is this open to question. See *United States v. Morgan*, 307 U. S. 183; Natural Gas Act, Section 19 (c). And it is settled that a court when exercising jurisdiction over the custody and distribution of a fund such as here involved acts "as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result." *United States v. Morgan*, 307 U. S. 183, 193-194. It is not improper or uncommon for federal courts of equity, when asked to dispose of or adjudicate "private rights" in property sub-

ject to their control, "to relinquish their jurisdiction in favor of the state courts," where its exercise concerns a matter which may more properly be settled by a state court or pursuant to a state procedure. *Pennsylvania v. Williams*, 294 U. S. 176, 185; cf. *Railroad Commission v. Pullman Co.*, 312 U. S. 496; *Burford v. Sun Oil Co.*, 319 U. S. 315; *Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168. In substance, this was the effect of the orders below. The transfer of the refunds to the municipal treasurers made them subject, under the terms of the orders, to appropriate state proceedings. The responsibility of the treasurers as stakeholders has not been questioned.

2. The circumstances of this case and the factual issues posed below make it clear that the court properly exercised its discretion by refusing to adjudicate finally petitioner's rights and by permitting such rights to be determined in appropriate local proceedings.

As the court below observed (R. 129), petitioner's claim was based "on the ground that its gas rates are, and have been inadequate," thus raising the issue of the reasonableness of the rates charged to local consumers. Municipal representatives of ultimate consumers in Iowa denied this contention. The resulting conflict manifestly raised issues with respect to local retail rates determinable under Iowa law. Whether or not the court below had jurisdiction to determine them in

the present proceeding (cf. Sections 1 (b) and 19 (c) of the Natural Gas Act), we think it clear that they could properly be left for consideration and disposition in a state forum.

Moreover, placing the fund with the city treasurers as representatives of the ultimate consumers enables petitioner's right to the fund to be tested in a single suit in the state courts, whereas a payment initially made to petitioner might require a multiplicity of actions by some 3,715 consumers (R. 82) or their representatives to establish their rights thereto.⁷

Since the "exercise of a 'sound discretion, which guides the determination of courts of equity,'" often "calls for a remission of the parties to the state courts, which alone can give a definitive answer to the major questions posed" (*Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168,

⁷ Indeed, outright payment of the fund to petitioner might place it beyond the reach of those who under state law might be entitled to receive it. Even if the Iowa cities concerned herein should, as a result of the Commission's rate-reduction order, fix lower rates for petitioner's sales at retail, consumers may still be deprived of the benefit of that reduction for the period during which the Commission's order was stayed. For the accumulated fund might fall within the category of past profits and hence might not be relevant in fixing future retail rates for the sale of gas. *Knorville v. Knorville Water Co.*, 212 U. S. 1, 14; *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395. To the extent that the prior rates charged by the Pipeline Company were passed on to petitioner's consumers—as presumably all items of costs are passed on—petitioner would receive a windfall as a result of the stay of the Commission's order.

172), the court below clearly did not abuse its discretion by refusing definitively to determine the respective rights of petitioner and the ultimate consumers to a minute fraction (less than $\frac{1}{2}$ of 1%) of a fund already otherwise fully distributed to consumers without objection. No showing has been made that adequate local procedures are not available whereby petitioner's alleged right to the fund can be tested.

CONCLUSION

The action of the court below was clearly correct, and the case does not present any question calling for further review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,

CHESTER T. LANE,
Special Assistants to the Attorney General.

JEROME H. SIMONDS,
Attorney.

CHARLES V. SHANNON,
General Counsel,

STANLEY M. MORLEY,
Attorney.

Federal Power Commission.

JUNE 1944.

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C., § 717 *et seq.*), are as follows:

SECTION 1. (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue

preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

REHEARINGS: COURT REVIEW OF ORDERS.

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for

any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the

additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

